

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,)	
)	No. 63036-9-I
Respondent,)	
)	DIVISION ONE
v.)	
)	UNPUBLISHED OPINION
VERNON MARK CALHOUN,)	
)	
Appellant.)	FILED: April 26, 2010

SPEARMAN, J. – Vernon Calhoun appeals his conviction of bail jumping. He argues that his attorney labored under a conflict of interest because he failed to endorse his paralegal as a witness in support of Calhoun’s defense that he had forgotten his court date and been misadvised about it. There was no actual conflict of interest. Counsel declined to call the paralegal based on the correct understanding that her anticipated testimony would not have supported a defense. The only conflict reflected in the record was a simple disagreement between Calhoun and his attorney over trial strategy, and the court did not abuse its discretion in denying the substitution of counsel when defense counsel’s assessment was accurate. We affirm.

FACTS

Calhoun was charged with first degree malicious mischief for breaking all the windows out of a car belonging to an acquaintance and was released on a promise to appear for all court dates. Calhoun failed to appear for a pretrial hearing on August 1, 2008, and was arrested later on a bench warrant. The State subsequently amended

the information to add a count of bail jumping for the missed court date.

At a subsequent pretrial hearing, Calhoun's counsel, Justin Wolfe, brought an oral motion to withdraw from the case on the basis of a conflict of interest. The court excused the prosecutor and heard the basis of counsel's motion in camera.

According to Wolfe, Calhoun said that he had lost his written notice of the August 1 court date he had missed. Calhoun also said that he called Wolfe's office on that date, and was referred by a voicemail recording to Wolfe's paralegal. Calhoun told Wolfe that the paralegal had told him his next court date was August 10, not August 1. After learning that there was a difference of opinion between Calhoun and his attorney regarding the strategy of calling the paralegal as a witness, and that the anticipated testimony of the paralegal would not confirm Calhoun's claim about what she had told him, the trial court denied the motion to withdraw. The court concluded there was no conflict because there was no showing that counsel had any interest that might cause him to refrain from presenting relevant evidence.

Calhoun was subsequently convicted and now appeals.

ANALYSIS

Calhoun contends that the record shows that his right to conflict-free counsel was violated because his attorney was prevented from presenting a plausible alternative defense by his conflicting loyalties to his client and his paralegal. We disagree.

Counsel owes the client a duty to avoid conflicts of interest.¹ In any situation

¹ Strickland v. Washington, 466 U.S. 668, 688, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984).

where counsel represents conflicting interests, Washington courts apply the conflict of interest rules to determine whether the right to effective counsel was violated.²

“[R]eversal is always necessary where a defendant shows an actual conflict of interest adversely affecting counsel’s performance.”³ In order to show adverse effect, the defendant need only demonstrate “that some plausible alternative defense strategy or tactic might have been pursued but was not and that the alternative defense was inherently in conflict with or not undertaken due to the attorney’s other loyalties or interests.”⁴ We review de novo whether the circumstances demonstrate a conflict under the rules of ethics.⁵

Calhoun’s argument depends entirely on his contention that the record shows that “Mr. Wolfe was strongly disinclined to call his paralegal to testify because she was an extension of his representation which presented a conflict of interest.”⁶ But this is not an accurate characterization of the record.

At the time of the motion, Wolfe explained that his paralegal was not in a position to confirm Calhoun’s account of their conversation and, for that reason, as a matter of strategy, he could not agree with Calhoun’s desire that she be called as a witness. He nonetheless was moving to withdraw because Calhoun believed that the reason for Wolfe’s choice was not a matter of strategy but was, instead, to protect the

² State v. McDonald, 143 Wn.2d 506, 513, 22 P.3d 791 (2001); State v. Regan, 143 Wn. App. 419, 427, 177 P.3d 783, review denied, 165 Wn.2d 1012 (2008).

³ McDonald, 143 Wn.2d at 513.

⁴ Regan, 143 Wn. App. at 428 (internal quotation marks omitted) (quoting United States v. Stantini, 85 F.3d 9, 16 (2d Cir. 1996)).

⁵ Id.

⁶ Appellant’s Brief at 3.

paralegal.

As the trial court commented in analyzing the circumstances, first, it does not appear that even if the paralegal would have testified as Calhoun wished, her testimony would be relevant because it would not have established a legal defense under the bail jumping statute.

“Any person having been released by court order . . . with knowledge of the requirement of a subsequent personal appearance before any court of this state . . . and who fails to appear . . . is guilty of bail jumping.”⁷ The knowledge element under the present version of the statute is satisfied if the defendant was notified of the required court date before he failed to appear.⁸ Because counsel’s offer of proof regarding the supposed conflict acknowledged that Calhoun had received such notice, it does not appear that counsel was caused by divided loyalties to forgo any plausible alternative legal strategy.

Moreover, as the trial court further commented, this conclusion is amplified here because, even if such a defense could theoretically be presented, given that the paralegal’s anticipated testimony would have been at odds with Calhoun’s, counsel’s decision not to call her was clearly the result of sound strategy, not of divided loyalties. Accordingly, the record discloses no actual conflict because it does not reflect any

⁷ RCW 9A.76.170(1).

⁸ State v. Fredrick, 123 Wn. App. 347, 353, 97 P.3d 47 (2004). In contrast, before 2001, former RCW 9A.76.170 stated, in pertinent part, that “[a]ny person having been released by court order or admitted to bail with the requirement of a subsequent personal appearance before any court of this state, and who knowingly fails to appear as required is guilty of bail jumping.”

“lapse in representation contrary to the defendant’s interests.”⁹

Calhoun also contends that the trial court’s order violated RPC 3.7, the lawyer-as-witness rule. This record, however, discloses no basis for such an argument because there was no showing under that rule that either Wolfe or his paralegal was actually “likely to be a necessary witness.”¹⁰

What the record does display is a disagreement between Calhoun and his counsel over the wisdom of calling the paralegal as a witness. A criminal defendant, however, does not have an absolute Sixth Amendment right to choose a particular advocate. If dissatisfied, the defendant must show good cause to warrant substitute counsel, such as “a conflict of interest, an irreconcilable conflict, or a complete breakdown in communication between the attorney and the defendant.”¹¹ “Whether an indigent defendant’s dissatisfaction with his court-appointed counsel is meritorious and justifies the appointment of new counsel is a matter within the discretion of the trial court.”¹² That the defendant loses confidence or trust in his attorney is not a sufficient basis on which to substitute new counsel.¹³ Here, the court sufficiently examined the circumstances to justifiably conclude that the matter was simply a disagreement over strategy, which did not require appointment of new counsel. We find no error on the court’s part in making this determination.

⁹ Regan, 143 Wn. App. at 428 (quoting State v. Robinson, 79 Wn. App. 386, 395, 902 P.2d 652 (1995)).

¹⁰ RPC 3.7(a).

¹¹ State v. Stenson, 132 Wn.2d 668, 734, 940 P.2d 1239 (1997), cert. denied, 523 U.S. 1008 (1998).

¹² State v. DeWeese, 117 Wn.2d 369, 376, 816 P.2d 1 (1991).

¹³ Stenson, 132 Wn.2d at 734.

Affirmed.

Spencer, J.

WE CONCUR:

Cox, J.

Grosse, J